Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SCOTT SHREFFLER

Petitioner

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Andrew J. Ostrowski, Esq.
BAILEY, STRETTON & OSTROWSKI
4311 North Sixth Street
Harrisburg PA 17110
717-221-9500

24 pp

QUESTION PRESENTED

Petitioner was convicted on a one count indictment charging conspiracy to distribute controlled substances. Petitioner testified during the sentencing proceedings to his distribution of controlled substances, and the trial court found Petitioner to have distributed controlled substances resulting in serious bodily injury by a preponderance of the evidence. The Third Circuit overturned the conviction and directed entry of judgment of acquittal. The Government indicted Petitioner for, *inter alia*, distributing controlled substances resulting in serious bodily injury. The question presented is:

Do the Double Jeopardy Clause and Due Process Clause of the Fifth Amendment bar Petitioner's prosecution for substantive offenses based upon evidence that was known to the Government when a one count conspiracy indictment was returned, was presented at trial and sentencing, and used to enhance Petitioner's sentence, but not charged as substantive offenses until Petitioner's conspiracy conviction was overturned?

RULE 29.6 STATEMENT

Supreme Court Rule 29.6 is not applicable to the Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The court of appeals' opinion is unreported. The opinion of the district court is unreported. The court of appeal's opinion in the prior case was reported at 256 F.3d 133 (3d Cir. 2001), *cert. denied* 122 S. Ct. 503.

JURISDICTION

The Court of Appeal's judgment was entered on September 25, 2002. There was no petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part that "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

STATEMENT

Petitioner was originally indicted with eight others, on one count of conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 on May 26, 1999, and was convicted, along with Daniel Pressler, after a jury trial September 28, 1999 (all other co-Defendants pled). The district court sentenced the Petitioner on August 9, 2000 after hearings held June 16, 2000 and July 14, 2000 finding, *inter alia*, that Petitioner distributed heroin resulting in serious bodily injury. During the sentencing proceeding, Petitioner testified to having distributed controlled substances, but denied any involvement in causing serious bodily injury to the two individuals at issue. The district court refused to apply the beyond a reasonable doubt

standard for the Petitioner, although Petitioner expressly requested that standard, and the district court applied that standard to Petitioner's co-defendant, who also was found to have distributed controlled substances resulting in serious bodily injury.

The court of appeals reversed the conspiracy conviction on July 2, 2001. *United States v. Pressler*, 256 F.3d 144 (3d Cir. 2001). The Petitioner was re-indicted July 12, 2001 on one count of distribution in violation of 21 U.S.C. § 841, in response to which Petitioner filed the instant pretrial motion to dismiss on double jeopardy grounds. The Government handed down a superseding indictment on December 12, 2001 consisting of 20 separate counts, including two counts of distribution of controlled substances resulting in serious bodily injury that are the same as the two findings of the district court on the serious bodily injury issue at sentencing. The district court denied Petitioner's motion to dismiss on December 17, 2001.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The court of appeals denied relief on September 25, 2002 and subsequently returned its mandate to the district court. A second pretrial motion was filed December 17, 2002 seeking, *inter alia*, dismissal of the indictment on a selective prosecution claim and judicial misconduct for violation of the *ex parte* requirements of Criminal Justice Act, 28 U.S.C. § 3006A(e), prejudicially revealing the Petitioner's principal defense witnesses to the Government.

REASONS FOR GRANTING THE PETITION

This Court must grant review of this case to squarely address the grave constitutional concerns anticipated by Mr. Justice Scalia's dissent in *Monge v. California,* 524 U.S. 721 (1998), which is now the prevailing view in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court cannot permit the Government to (1) withhold known substantive charges when a defendant is indicted for an underlying conspiracy, (2) only to

prosecute those charges as sentencing enhancements after conviction for the conspiracy, and then (3) indict a defendant on the same substantive charges after the conspiracy conviction is overturned; for to do so is to "violate the very core of the double jeopardy prohibition." *Monge*, 524 U.S. at 741. In *Monge*, Mr. Justice Scalia found that "California's system is not nearly that sinister", and Petitioner submits that this Court must find that the Government's system, as applied to Petitioner, is every bit that sinister. This Court must enunciate as a rule of fundamental fairness as the law of the land that the Government cannot subject a defendant to repeated prosecutions and punishments for conduct known to the Government as part of the same criminal episode when the charges were first brought.

This case also involves prosecutorial and judicial overreaching and the manipulation of Petitioner's assertions of his constitutional rights, as recognized by this Court's developing precedent, that reflect a clear attempt to employ "means of dispensing with [Petitioner's] inconvenient constitutional 'rights' . . . to eviscerate . . . [Petitioner's] right to notice, jury trial, and proof beyond a reasonable doubt", the most fundamental protections against the allegations being made against him. *Monge*, 524 U.S. at 740.

When Petitioner was first indicted in May, 1999, all acts for which he is being charged in the July 11, 2001 indictment and December 12, 2001 superseding indictment had occurred, and were fully known to the Government. The Government elected to return a one-count indictment for a conspiracy to distribute controlled substances knowing that, at that time, allegations of quantity and distribution resulting in serious bodily injury could be proven as sentencing enhancements to increase the statutory maximum penalty for the base distribution offense. In accordance with *Jones v. New York* 526 U.S. 227 (1999). Petitioner was entitled to proof beyond a reasonable doubt on the enhancement allegations. Petitioner specifically requested the trial court to apply the beyond a reasonable doubt standard to the

enhancement allegations, and the trial court sentenced Petitioner's co-defendant beyond the statutory maximum for the base offense by finding, beyond a reasonable doubt, that Petitioner's co-defendant distributed controlled substances resulting in serious bodily injury. This Court decided *Apprendi* between the sentencing of the co-defendant and Petitioner. When *Apprendi* was decided, the Government and the trial court knew that this Court had enunciated a clear principle mandating "notice, jury trial and proof beyond a reasonable doubt on 'enhancement' allegations as a matter of [federal constitutional] law." Nevertheless, the trial court, in what cannot be justified as anything other than a knowing attempt to eviscerate Petitioner's known constitutional rights to deprive him of his liberty, sentenced Petitioner beyond the statutory maximum, after *Apprendi*, by finding, *by a preponderance of the evidence*, that Petitioner distributed controlled substances resulting in serious bodily injury.[1]

Petitioner was, without question, prosecuted *and* punished for all conduct for which he is now being charged. The Government could have brought every charge Petitioner is now facing in a single indictment, but chose, instead, to return a one count conspiracy indictment, alleging as the "manner and means" the facts that, in light of *Apprendi,* must be submitted to a jury and proven beyond a reasonable doubt. Because Petitioner's conviction was overturned, the Double Jeopardy Clause bars all conduct for which Petitioner was prosecuted and punished. Petitioner's trial *and* sentencing constitute *the* former prosecution, and, as such, the present prosecution is categorically

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[1]By finding Petitioner guilty by only a preponderance of the evidence when the law clearly required determination of guilt beyond a reasonable doubt, the trial court's findings, under the circumstances, must be deemed to constitute an implicit acquittal. *Sanabria v. United States*, 437 U.S. 54, 63 (1978) (prosecution barred after acquittal, "even if the legal rulings underlying the acquittal were erroneous").

barred by operation of the "same elements" test as set forth in *Blockberger v. United States*, 284 U.S. 299 (1932).

The issue is fundamentally one of collateral estoppel or, Petitioner submits, *res judicata*. This Court has long recognized collateral estoppel as "an established rule of federal criminal law . . [that] is embodied in the Fifth Amendment guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 443-45 (1970). While this Court, in *United States v. Dixon*, 509 U.S. 688, 704, (1993) overruled the prior adoption of a "same conduct" test in *Grady v. Corbin*, 495 U.S. 508 (1990), and *United States v. Felix*, 503 U.S. 378 (1992) held that prosecution for a conspiracy *after* a *conviction* of the substantive offense is not barred by double jeopardy, neither case involved the collateral estoppel effect of the prior judgment, and, in *Felix*, the Court recognized that "*[t]he actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses.*" 503 U.S. at 385 (emphasis added). Petitioner is merely asserting that, as a matter of the applicability of collateral estoppel and/or *res judicata*, the Government had a full, fair, and complete opportunity to litigate every issue it now seeks to litigate, and is barred by double jeopardy from litigating those same issues again.

Clearly, this Court is presented with circumstances where Petitioner is being forced to "twice run the gauntlet," and Petitioner urges this Court to grant review in order to stop the evisceration of his constitutional rights from continuing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Andrew J. Ostrowski, Esq.
BAILY, STRETTON & OSTROWSKI
4311 North Sixth Street
Harrisburg, PA 17110

APPENDIX

OPINION OF THE COURT OF APPEALS

United States Court of Appeals for the Third Circuit

No. 02-1062

United States of America
Plaintiff

v.

Scott Shreffler
Defendant

Order Issued September 25, 2002

SLOVITER, RENDELL and FUENTES, *Circuit Judges*

Appellant Scott Shreffler ("Shreffler") challenges the District Court's denial of his motion to dismiss the indictment. For the following reasons, we find that the substantive offenses with which Shreffler has been charged are not barred under the Double Jeopardy Clause as a result of his prior prosecution for conspiracy to commit the same offenses. Accordingly, we affirm the District Court's denial of Shreffler's motion to dismiss the indictment.

On September 28, 1999, a jury found Shreffler and a co-defendant guilty of conspiracy to distribute in excess of 100 grams of heroin in violation of 18 [sic] U.S.C. § 846. This court reversed Shreffler's conviction because the Government had failed to prove the existence of an agreement necessary for conviction of conspiracy. *United States v. Pressler*, 256 F.3d

144 (3d Cir. 2001). On July 11, 2001, the Government filed an indictment charging Shreffler with distribution of heroin, a crime not charged in the previous indictment. On October 15, 2001, Shreffler moved to dismiss the indictment on double jeopardy grounds. On December 12, 2001, the grand jury returned a more specific, superseding indictment charging Shreffler with twenty counts of distribution of heroin. On December 17, 2001, the District Court denied Shreffler's motion to dismiss the indictment. Shreffler's timely interlocutory appeal followed.

We have jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1291. Pretrial orders denying motions to dismiss an indictment on double jeopardy grounds fall with the 'collateral order exception' to the final-judgment rule, and thus 'final decisions' within the meaning of § 1291. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Abney v. United States*, 431 U.S. 651, 657 (1977); *United States v. Esposito*, 912 F.2d 60, 61-62 (3d Cir. 1990). The applicable standard of review is plenary. *United States v. Grayson*, 795 F.2d 278, 281 (3d Cir. 1986).

Shreffler argues that the indictment must be dismissed because the crimes charged: 1) are based upon the same evidence presented in the earlier conspiracy prosecution; 2) were lesser included offenses of the charge previously prosecuted; and 3) were previously adjudicated by the District Court in computing his base offense level in the prior prosecution under a preponderance of the evidence standard. As a result, Shreffler argues, the charges are barred by the Double Jeopardy Clause.

The Double Jeopardy Clause forbids the duplicative prosecution of a defendant for the 'same offence." U.S. Const., Amdt. 5; *see also Blockburger v. United States*, 284 U.S. 299 (1932). The Court has explained that "the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct," leading to the conclusion that "a mere overlap in proof between two prosecutions does not establish a double jeopardy violation."

United States v. Felix, 502 U.S. 378, 387 (1992) (finding no double jeopardy violation where two of nine overt acts supporting conspiracy charge were previously prosecuted as substantive crimes); *see also Esposito*, 912 F.2d at 64-65 (finding no double jeopardy problem where the evidence to be introduced in narcotics prosecution was, in part, the same evidence introduced during earlier RICO conspiracy). Here, the superseding indictment charges Shreffler with the illegal conduct of distributing heroin. The prior indictment charged him with the illegal conduct of conspiring to distribute heroin. The fact that the same evidence will be used to prove that Shreffler actually distributed heroin as was used to prove that he conspired to distribute heroin does not bar the second prosecution under the Double Jeopardy Clause.

It is true that the Double Jeopardy Clause bars a subsequent prosecution if one of the two offenses is a lesser included offense of the other, *Grady v. Corbin*, 495 U.S. 508, 519 (1990), but the conspiracy to commit an offense and the offense itself are separate offenses for double jeopardy *Felix*, 503 U.S. at 390-391. In fact, the Court has said that "the same overt acts charged in a conspiracy count may also be also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself." *United States v. Bayer*, 331 U.S. 532, 542 (1947). The Government charged Shreffler with engaging in a conspiracy to distribute heroin in the first prosecution. In the instant prosecution, however, the Government is charging Shreffler with the actual distribution of heroin. Underscoring this point, this court noted in reversing the conspiracy conviction that the evidence at trial was more than sufficient to convict Shreffler of the crime of distribution of heroin even though the proof of an agreement was insufficient. *Pressler*, 256 F.3d at 156-157. It is clear that the distribution charges are not lesser included offenses of the conspiracy charge, bur rather, entirely distinct crimes.

Shreffler's final argument on appeal is that the District

Court's finding at sentencing by a preponderance of the evidence, that Shreffler had distributed the heroin that caused the overdose injuries of Joseph Stoner and Scott Knouse, amounted to a finding that there was not proof of the same beyond reasonable doubt. The District Court's determination at sentencing that the preponderance of the evidence burden was met is not equivalent to a finding that the reasonable doubt burden could not be met at trial. Shreffler's argument is purely conjectural, and, therefore, meritless.

We agree with the District Court's conclusion that the indictment is not barred by the Double Jeopardy Clause. Accordingly, for the reasons substantially set forth in the written opinion of the District Court, we will affirm.

/s/ Fuentes, J.

OPINION OF THE DISTRICT COURT

United States of America	:	
Plaintiff	:	1:CR-01-0215
v.	:	
Scott Shreffler	:	(Caldwell, J.)
Defendant	:	

Order Issued December 17, 2001

Opinion

I. Introduction.

We are considering the defendant, Scott Shreffler's, pretrial motions. Shreffler was indicted for: (1) distributing over 100 grams of heroin from on or about December 1, 1996, to May 26, 1999, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(1); (2) distributing heroin as a person over the age of eighteen to persons under the age of twenty-one in violation of 21 U.S.C. § 859(a); and (3) distributing heroin, or aiding and abetting its distribution, resulting in overdoses and serious bodily injury to at least two people on or about February 18, 1997, and November 6, 1998.

After Shreffler filed his pretrial motions, he was indicted in a twenty-count superseding indictment. That indictment, among other things, was more specific in the charges and named individuals to whom Defendant had distributed heroin.

II. Discussion.

A. *The Double Jeopardy Issues.*

In September 1999, Defendant was tried for conspiracy to distribute heroin in violation of 21 U.S.C. § 836 arising from essentially the same circumstances as the instant case. After a jury verdict against him, we denied his post-trial motion for judgment of acquittal which argued that there was insufficient evidence for a conspiracy conviction. On appeal, the Third

Circuit reversed, ruling that the government had failed to prove an essential element of a conspiracy offense, that Shreffler had agreed with someone else to distribute heroin. The court of appeals did note, however, that there was ample evidence at trial that Defendant had committed the substantive offense of distributing heroin. Nonetheless, because he had been charged only with conspiracy, the court vacated his conviction and ordered us to enter a judgment of acquittal in Shreffler's favor. *See United States v. Pressler*, 246 F.3d 144 (3d Cir. 2001) *cert. denied* 122 S.Ct. 502.

The Double Jeopardy Clause of the Fifth Amendment "protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." *Monge v. California*, 524 U.S. 721, 727-728 (1998). The Clause also has a collateral estoppel component, *Ashe v. Swenson*, 397 U.S. 436 (1970), prohibiting a prosecution when the defendant can demonstrate "'that his acquittal in his first trial represented a jury determination' of an 'ultimate issue' in the second trial." *United States v. Console*, 13 F.3d 641, 665 n. 28 (3d Cir. 1993) quoting *Dowling v. United States*, 493 U.S. 342, 348 (1999).

Defendant makes various arguments that the current prosecution violates the Double Jeopardy Clause. He first argues that it subjects him to a second prosecution for the conduct that formed the basis of the conspiracy prosecution. We reject this argument. As the government points out, relying on *United States v. Felix*, 503 U.S. 378 (1992), the Double Jeopardy Clause does not bar successive prosecutions of a conspiracy offense and any underlying substance offense since the two crimes are not the same offense for double jeopardy purposes. *See also United States v. Price*, 13 F.3d 711, 717 (3d Cir. 1994).

Defendant tries to distinguish *Felix* on two grounds. First, he points to language in that case indicating that it dealt with factually different crimes, 503 U.S. at 385, while here the conspiracy prosecution and the current one are based on the same

underlying offenses.

This argument misunderstands *Felix*. The language Defendant relies on dealt with counts in the second prosecution other than the conspiracy count. In connection with the conspiracy count, the Supreme Court cited "long established precedent," *id.* at 388., in affirming that "a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." *Id.* at 389.

Second, Defendant argues that *Felix* is distinguishable because the first prosecution there was for a conspiracy, which resulted in a conviction, and then the government prosecuted the substantive offenses. Here, on the other hand, the government failed to prove a conspiracy in its first prosecution and all of its evidence in that case went to prove the substantive crimes.

There are several problems with this position. First, it erroneously asserts that the conspiracy prosecution in *Felix* was first; actually, the defendant there was prosecuted on several substantive offenses before the prosecution containing the conspiracy count was filed. Additionally, if the argument is really one that acquittal in the first case bars a second prosecution, it is meritless. In *United States v. Esposito*, 912 F.2d 60 (3d Cir. 1990) (*Esposito I*), the Third Circuit allowed a prosecution on substantive drug offenses to continue after the defendant was acquitted of a RICO offense in which the drug transactions were predicate offenses, the acquittal playing no part in the analysis.[2]

Second, the argument seems to be that the Double Jeopardy Clause bars the instant prosecution because the

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[2][Court opinion footnote 1] The court stated: In this case, we do not face the issue of multiple punishments for the same offense because Esposito was acquitted in the first prosecution. Our inquiry therefore is limited to whether Esposito's second prosecution offends the protection afforded by the Double Jeopardy Clause from later prosecution for the same offense after being acquitted.

evidence, or may because all of the evidence, in the first case was about the substantive offenses. However, the Double Jeopardy Claus does not bar a second prosecution simply because the government uses the same evidence in both trials. *See Dowling v. United States*, 493 U.S. 342, 348 (1999) (double jeopardy collateral estoppel does not bar relevant evidence from a second prosecution simply because it relates to a crime for which the defendant had been previously acquitted). Instead, the Clause bars a second prosecution if it is for the same offense as the previous prosecution.[3]

Defendant's second argument, as we understand it, is that he has been subjected to successive punishment because he remains incarcerated as a result of the second prosecution even though the Third Circuit acquitted of the conspiracy charge. Perhaps we misunderstand it, but the argument appears to be frivolous. In accord with the Third Circuit's order, we vacated Shreffler's conviction and sentence, so he is not currently imprisoned in relation to the first prosecution. Hence, he is not suffering a successive punishment.

Defendant's third argument is that, in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the instant prosecution subjects him to successive punishment for the conduct we took into consideration in enhancing his sentence on the conspiracy offense.[4] Defendant acknowledges that under *Whitte v. United*

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[3][Court opinion footnote 2] To the extent that the argument is that the order of the prosecutions is relevant, it also has no merit. *See United States v. Eley*, 968 F.2d 1143, 1147 (11th Cir. 1992); *United States v. Dike*, 1995 WL 112982 at *3 (E.D.Pa.).

[4][Court opinion footnote 3] In determining Shreffler's sentence on the conspiracy offense, in addition to drug quantity, we ruled after a sentencing hearing, and using a preponderance-of-the-evidence standard, that he caused serious bodily injury to Joseph Stoner and Scott Knouse. In this prosecution, the government has included the serious-bodily-injury issue in the indictment for the jury's resolution.

States 515 U.S. 389 (1995), double jeopardy does not bar a subsequent prosecution for conduct that was used at sentencing proceedings to enhance a previous federal conviction, but contends that *Apprendi* teaches that any such conduct must be treated as an offense subject to the Double Jeopardy Clause. Hence, when the current indictment alleges this same conduct as part of the offense, it is an attempt at successive punishment.

We reject this contention. We assume for the sake of argument that *Apprendi* requires that the serious-bodily-injury issue be alleged in the indictment and sent to the jury for resolution under the reasonable-doubt standard.[5] Nonetheless, this argument fails for the reason we just stated; Shreffler's conviction and sentence were vacated, so he is not currently suffering a successive punishment.

Defendant's fourth argument (as presented for the first time in his reply brief) is that the government is collaterally estopped from pursuing the second prosecution because even though there was no formal acquittal on the substantive charges, "a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined," (reply brief at p. 5) (quoting *United States v. Keller*, 624 F.2d 1154, 1157 (3d Cir. 1980)), and because "the defense of collateral estoppel [can] be raised in a second proceeding as to facts previously established but not necessary to sustain" the original charge. . . " (Reply brief at p. 5) (quoting *Keller*, 624 F.2d at 1159 (quoted case omitted)). Defendant insists that *Keller* is the law of this Circuit and must be applied.

Although Defendant insists that *Keller* is the law of this Circuit, in fact, the Third Circuit decided in *United States v.*

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[5][Court opinion footnote 4] In *Apprendi*, the Supreme Court held due process and the Sixth Amendment right to trial by jury requires that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable-doubt." *Id.* at 490.

Salamone, 902 F.2d 237, 240 (3d Cir. 1990), that "*Keller* is no longer precedential in this circuit" because its reasoning could not survive the Supreme Court's analysis in *Dowling, supra*. Thus, we need not follow *Keller*.

Even if we were inclined to examine Defendant's *Keller* argument, we fail to see how it supports a double jeopardy claim here, at least as he represents *Kellers'* requirements. Quoting *Keller* in part, Shreffler argues that collateral estoppel can be asserted in a second prosecution "as to facts previously established but not necessary to sustain" the original charge. However, Defendant does not specify what these facts established and how these facts collaterally estop the instant prosecution. Certainly, it was established in the first prosecution that Shreffler had not agreed with anyone to distribute heroin, but that facto does not bar the instant case, even under the correct statement of the double-jeopardy collateral estoppel rule, when the defendant can demonstrate "'that his acquittal in his first trial represented a jury determination' of an 'ultimate issue' in the second trial." *United States v. Console*, 13 F.3d 641, 665 n. 28 (3d Cir. 1993) (quoting *Dowling v. United States*, 493 U.S. 342, 348 (1999)).

Shreffler's fifth double-jeopardy argument is that he cannot be prosecuted for any violation of 21 U.S.C. § 859, relating to a person over the age of twenty-one who distributes an illegal drug to a person under eighteen, because the same issue was tried and presented to the jury in the first prosecution. Defendant recognizes (for this argument only, apparently) the general rule that a conspiracy is different from a substantive offense for double jeopardy purposes, but maintains that double jeopardy applies to the section 859 offense because "[a]s applied to the present indictment, the charge of distribution in violation of § 859 is clearly a lesser included offense in the charge of a conspiracy that violated that provision and, inasmuch as distribution in violation of § 841 is a lesser included offense [of] distribution in violation of § 859, all charges for distribution are

barred by double jeopardy." (Defendant's supporting brief at p. 9). In support, Shreffler cites *United States v. McQuilkin*, 78 F.3d 105 (3d Cir. 1996); *United States v. Garcia*, 919 F.2d 881 (3d Cir. 1990); *United States v. Cohen*, 197 F.2d 26 (3d Cir. 1952); and *United States v. Frazier*, 89 F.2d 1501 (115h Cir. 1996).

None of the cases cited support the argument. *McQuilken* held that 18 U.S.C. § 3553(f), authorizing a sentence below the mandatory minimum, did not apply to 21 U.S.C. § 860. *Garcia* held that conduct used to enhance a previous sentence could be the subject of subsequent prosecution without violating the Double Jeopardy Clause. *Cohen* upheld a double jeopardy claim involving two conspiracy charges arising from the same overt acts, a factual situation different from the one here. The only case that comes close is *Frazier*, which rules that double jeopardy barred prosecution on a section 841 offense as a lesser included offense of 21 U.S.C. § 860, but that case involved two substantive offenses. As pointed by the government, and as already noted, the previous prosecution was for conspiracy, which is a separate offense for double-jeopardy purposes.

Defendant's sixth double-jeopardy argument is that the Clause bars the government's attempt to try him for causing death or serious bodily injury for two reasons. First, we enhanced his sentence in the previous prosecution for this fact and an attempt to impose punishment again would be successive. Second, we found that this factor had been proved only by a preponderance of the evidence thereby ruling that the government could not satisfy the reasonable-doubt standard.

We reject both arguments. As already noted, Defendant's sentence in the first prosecution was vacated, so he would not suffer a second punishment if a jury in this case found the same facts as we did. Additionally, we did not say that the government had only established this factor by a preponderance of the evidence; that was just the standard we used at the sentencing hearing. We did not consider whether the government could

satisfy the higher standard of reasonable standard. Our conclusion also applies to Defendant's attempt for the same reasons to bar prosecution on his drug quantity.

B. *The Constitutionality of Section 841.*

Citing *United States v. Buckland*, 259 F.3d 1157 ((th Cir.), *en banc reconsideration granted*, 265 F.2d 1085 (9th Cir. 2001), Defendant contends that 21 U.S.C. § 841 is facially unconstitutional under *Apprendi, supra.* We must reject this contention because the Third Circuit recently decided that section 841 withstands a facial constitutional challenge under *Apprendi. See United States v. Kelly*, ___F.3d ___, 2001 WL 1545672 (3d Cir. 2001) (collecting cases).

C. *The Due Process Claim Based on Vindictive Prosecution and Pre-Indictment Delay.*

Defendant argues that the indictment should be dismissed because it is motivated by prosecutorial vindictiveness. He relies on the following. First, this prosecution, based on the same factual circumstances as the previous case, was brought after Shreffler exercised a lawful right, presumably his right to seek an acquittal on appeal. Second, the government continues to falsely insist that Defendant introduced heroin to Lewistown, Pennsylvania, even thought one law enforcement official has testified that the drug came to the town well before Defendant began dealing.

We reject Defendant's position. Defendant cites *United States v. Esposito*, 968 F.2d 300 (3d Cir. 1992) (*Esposito II*), in support, but that case actually refutes his first contention. In *Esposito II*, the Third Circuit rejected the very argument Shreffler makes here, that when a defendant has been acquitted on charges, a second prosecution arising from the same factual circumstances should be presumed to be vindictive. As to Shreffler's second contention, it does not establish actual vindictiveness.

Defendant also asserts that pre-indictment delay has prejudiced him. Among other things, he relies on the following.

First, Joseph Stoner, one of the witnesses against him, is now dead from an unrelated drug overdose, and thus is unavailable for trial. Second, in violation of his Fifth Amendment right to remain silent, Defendant was forced to testify at the sentencing hearing in the first prosecution and this prejudice alone justifies dismissal of the indictment. Third, numerous other proceedings have intervened between the first trial and the second prosecution, such as additional plea agreements and other (unspecified) circumstances that will impede the defense. Finally, Shreffler contends that the government cannot give one legitimate reason for the delay in this indictment, finding significance in the following notions. First, there might be reason for delay in bringing a conspiracy charge but not in prosecuting substantive offenses. Second, Defendant is the only person involved in the Lewistown drug trade who was charged with substantive offenses after having been acquitted of a conspiracy charge.

> In *United States v. Sebetich*, 776 F.2d 412 (3d Cir. 1985), we emphasized that "[t]o invoke the extreme sanction of dismissal of the indictment [ ] under the Due Process Clause," the defendant must prove that the delay was a deliberative devise to gain an advantage over him and that it caused actual prejudice in presenting a defense. *Id.* At 430. The statute of limitations is a defendant's primary guarantee against the prosecution of stale criminal charges.

United States v. Fulford, 825 F.2d 3, 9 (3d Cir. 1987).

We reject the pre-indictment-delay argument because Shreffler has presented no evidence that the government's delay was an intentional attempt to gain an advantage over him. To the contrary, it resulted from the Third Circuit's recent acquittal of him and, apparently, the government's disappointment with the results of the first prosecution in which the evidence against Shreffler was overwhelming, at least as to substantive violations

of the law, as the Third Circuit noted. *Pressler, supra*, 256 F.3d at 150 ("There is no question that Shreffler distributed a sizable amount of heroin. Evidence at trial established at least nineteen named people to whom Shreffler provided the drug"). We also conclude that he has failed to meet the prejudice part of the test.

D. *The Motion to Suppress All Prior Statements of Joseph Stoner.*

On the basis of his right to confront the witnesses against, Defendant moves to suppress all prior statements of Joseph Stoner, now deceased, that would prove his guilt as inadmissible hearsay. The government counters that prior testimony under oath and subject to cross-examination is admissible under Fed.R.E. 804 if the witness is unavailable because he is dead. Defendant replies that Stoner's prior testimony should not be admitted on the conclusional assertion that Shreffler's previous counsel was ineffective in not doing an independent pretrial investigation.

We will deny Defendant's motion at this time.

E. *The Motion to Dismiss the Indictment for Duplicity, or in the Alternative, for a Bill of Particulars and for Discovery of Investigative Materials.*

Defendant moves to dismiss the indictment for duplicity, or in the alternative, seeks a bill of particulars. He also moves for discovery of investigative materials from cases 1:CR-99-133, 1:CR-99-270, 1:CR-98-321 and this case, including grandy jury transcripts from this case, along with a witness list.

His argument about the duplicity of the indictment and the need for a bill of particulars relates to the original indictment. The superseding indictment appears to cure the defects in the original one, so this argument is moot.

As to the motion for discovery, again the need for it is predicated on the vagueness of the original indictment. We also believe the government will comply with its obligation to provide exculpatory evidence and *Jenck's* material. As to a witness list, the government represents that it does not know yet

who it will call at trial, although it says it will try to call every witness who testified at the first trial. In these circumstances, we will not order production of a witness list.

We will issue an appropriate order.

/s/ William Caldwell, J.